



REPUBLIC OF KENYA



KENYA LAW
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**Shah v Commissioner of Domestic Taxes (Income Tax Appeal E052 of 2022)
[2023] KEHC 20848 (KLR) (Commercial and Tax) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E052 OF 2022
JWW MONG'ARE, J
JULY 27, 2023**

BETWEEN

PRAVINCHANDRA NEMCHAD KANJI SHAH APPELLANT

AND

THE COMMISSIONER OF DOMESTIC TAXES RESPONDENT

*(Being an appeal from the judgment of the Tax Appeals Tribunal dated
14/4/2022 in Tax Appeals Tribunal Appeal Number 169 of 2021)*

JUDGMENT

1. The Appellant is a Registered Taxpayer under PIN A000197xxxx for both Income Tax and VAT obligations and owns commercial properties within Embu Town Plot No 1112/27 in his individual capacity (property 1) and Plot LR No 1112/487 allegedly owned jointly with another person (property 2).
2. Upon review of the Appellant's returns filed for both Income Tax and VAT for the years 2016 to 2019, the Respondent established variances between the income declared for purposes of Income tax and VAT. The variance was due to undeclared income from property 2 which the Appellant alleged was owed jointly with one Mr Mahendra Shah.
3. The Respondent went ahead to assess the Appellant based on the fact that the income earned from the alleged co-owned property was not charged VAT. The Appellant objected to this assessment on January 15, 2021 however the Respondent rejected the Appellant's objection fully as he did not provide evidence in support of his grounds of objection through its Objection decision dated March 2, 2021.



4. The Appellant appealed against the Objection decision to the Tax Appeals Tribunal (the Tribunal) which rendered its judgment on the appeal on April 14, 2022. The Tribunal found no merit in the appeal before it and dismissed it. Further the Tribunal upheld the Respondent's Objection Decision dated March 2, 2021.
5. The Appellant being dissatisfied with the judgment of the Tribunal issued on April 14, 2022 appealed against the whole of the decision it to this court on the following grounds:
 - “1. That the Honourable Tribunal erred in fact and in law by upholding the Assessment dated December 17, 2020, on the basis that the Respondent is empowered under section 31 of the Tax Procedures Act to use whatever information is available to it in confirming the assessment.
 2. That the Honourable Tribunal erred in fact and in law by allowing the Respondent to tax the Appellant where the Partnership did not voluntarily register for VAT.
 3. That the Honourable Tribunal erred in law and in fact in allowing the Respondent to bring to charge Partnership income on the Appellant in contravention of section 34 of the VAT Act.
 4. That the Honourable Tribunal erred in law by disregarding that the burden of proof had shifted to the Respondent to discharge after the Appellant had provided the requisite documents at the objection stage.
 5. That the Honourable Tribunal erred in law in failing to find that the Appellant had not met the threshold under Section 5 of the VAT Act, to wit annual turnover exceeding KES 5,000,000.00/=.
 6. That the Honourable Tribunal erred in law and fact in failing to consider the evidence and submissions tendered by the Appellant.”
6. Based on the grounds above, the Appellant prayed for orders to have the judgment dated April 14, 2022 upholding the additional assessments for VAT dated March 2, 2021 issued by the Respondent be dismissed and an order to have the Appellants objection to each of the additional assessments for VAT upheld.
7. The Respondent opposed the appeal through its Statement of Facts dated February 24, 2023.
8. It was contended that the Appellant owns commercial property within Embu Town, Plot No 1112/27 in his individual capacity and Plot LR No 1112 / 487 allegedly owned jointly with another person. That upon review of the Appellant's returns, the Respondent established variances between the income declared for purposes of Income Tax and VAT.
9. The Respondent contended that the VAT under declaration was due to undeclared income from the commercial property allegedly jointly owned in partnership with one Mr Mahendra Shah and that the Appellant confirmed that the said partnership was not registered.
10. The Respondent contended that it rejected the Appellant's Objection to its assessment as it did not provide evidence in support of his grounds of objection. That the Appellant did not provide any documentation in support of his position that he co-owned the property LR No 1112/487 and did not account for taxes in respect to rental income of the property.



11. The Respondent averred that it issued the Appellant with an assessment on VAT because he declared rental income for the alleged jointly owned property in his income tax returns but failed to declare the income for purposes of VAT. That in the absence of evidence to disprove the assessment, the Respondent prayed to have the appeal dismissed with costs.
12. Both parties filed their respective submissions in support and/or opposition to the appeal herein which the court has considered. The grounds of appeal can be condensed to the following issue for determination: “Whether the Respondent erred in issuing additional assessments.” I note that the Appellant submitted that it furnished the Respondent with documents to support the objection therefore it discharged its evidentiary burden of proof. That this was done when the Respondent was supplied with a partnership deed, a copy of the certificate of lease to the property showing the joint ownership and details of the partners accounts containing the proceeds from the property.
13. On the other hand, the Respondent submitted that the Appellant did not provide any evidence in support of its grounds of objection. That there was no evidence of the existence of a duly registered partnership nor a joint bank account where income from the alleged jointly owned property was banked.
14. It was the Respondent’s case that the Appellant did not discharge its burden of proving that the Income Tax and VAT assessments were erroneous as it did not adduce evidence to support its objection. Vide an Objection Decision dated March 2, 2021, the Respondent noted that the Appellant did not validly lodge his objection application as specified under Section 51(3) of the [Tax Procedure Act](#).
15. The Appellant’s basis for not charging VAT on the second property was that he owned it jointly with another person and that the gross income of the property was below the Kshs 5,000,000/- threshold required to register for VAT. The Appellant annexed in its Record of Appeal at page 57, a partnership agreement between himself and Mr. Mahendra Shah dated January 5, 2015. The agreement explains their relationship as tenants in common of equal shares in the second property and their desire of letting the premises. On page 60 of the Record of Appeal, the Appellant annexed a Certificate of Lease for the second property showing that it is jointly owned by himself and Mr Mahendra Shah. I note however that the Appellant did not provide proof of a joint bank account or bank statements containing the income from the jointly owned property.
16. Under our tax laws, the burden of proving a tax assessment wrong is upon the taxpayer. I agree with the tribunal’s finding that by failing to provide the documents showing the existence of a duly registered partnership and bank statements of the alleged partnership, the Appellant failed to discharge the burden of proof in showing that the second property was indeed held jointly with another person. Section 31 of the [Tax Procedure Act](#) 2015 states:-

“ the Commissioner may amend an assessment (referred to in this section as the “original assessment”) by making alterations or additions, from the available information and to the best of the Commissioner’s judgments, to the original assessment of a taxpayer for a reporting period to ensure that-

(c) the taxpayer is liable for the correct amount of tax payable in respect of the reporting to which the original assessments relate.”
17. Under Section 31 above, if no such proof is available, the Respondent is empowered under Section 31 of the [Tax Procedures Act](#) to use whatever information that is available to it as well as its best judgment to issue any additional assessment. In this case the Respondent relied on the Appellant’s income tax returns filed for property 2.



18. I find therefore that the assessments were not unreasonable in the circumstances and that the Respondent rightfully issued the amended assessments. In conclusion I find no merit in the instant application and dismiss the same with costs awarded to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JULY 2023

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

No appearance for the applicant.

Ms. Masai holding brief for Ms. Mwongera for the Respondent.

Sylvia- Court Assistant

